

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rondat, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Period 12/31/78-12/31/79. :

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of August, 1985, he served the within notice of Decision by certified mail upon Rondat, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rondat, Inc.
4444 West Lawrence Ave.
Chicago, IL 60630

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
21st day of August, 1985.

David Parchuck

Sumner O. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rondat, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Period 12/31/78-12/31/79. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of August, 1985, he served the within notice of Decision by certified mail upon Stephen L. Solomon, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen L. Solomon
Hutton & Solomon
342 Madison Ave.
New York, NY 10173

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
21st day of August, 1985.

David Parchuck

James A. DeGuzman
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 21, 1985

Rondat, Inc.
4444 West Lawrence Ave.
Chicago, IL 60630

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Stephen L. Solomon
Hutton & Solomon
342 Madison Ave.
New York, NY 10173
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
RONDAT, INC.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1978	:	
and 1979.	:	

Petitioner, Rondat, Inc., 4444 West Lawrence Avenue, Chicago, Illinois, 60630, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1978 and 1979 (File No. 40519).

Petitioner, by its duly authorized representatives, Hutton & Solomon, Esqs., (Stephen L. Solomon, Esq., of counsel), waived a hearing and submitted its case for decision based upon the entire file, with all briefs to be submitted by April 19, 1985. After due consideration of the file the Commission renders the following decision.

ISSUE

Whether the Audit Division properly required petitioner to include in its entire net income ninety percent of the interest petitioner paid to the owner of its non-voting preferred stock.

FINDINGS OF FACT

1. On September 15, 1982, following a field audit, the Audit Division issued to petitioner, Rondat, Inc. ("Rondat"), separate notices of deficiency advising petitioner of asserted deficiencies in the amounts of \$111,646.30 for 1978 and \$133,037.40 for 1979, plus interest.

2. Rondat was incorporated in New York State on January 16, 1973, and began doing business in New York State on the same date. Rondat is engaged in the real estate rental business, and owns eight buildings located in New York City. Its offices are located in Chicago, Illinois.

3. The deficiencies at issue herein stem from the Audit Division's determination that Bankers Life and Casualty Company ("Bankers") owned more than five percent of Rondat's issued capital stock, thus requiring Rondat to include in its entire net income ninety percent of the interest it paid to Bankers [Tax Law §208.9(b)(5)].

4. Bankers loaned money to Rondat from the time of Rondat's incorporation through the years in issue. In addition, Bankers acquired from third parties between 1976 and 1978 certain of the mortgages on the real property owned by Rondat. Bankers also owns one hundred percent of Rondat's non-voting preferred stock, consisting of 665 shares of such stock purchased at a cost of \$13,300,000.00.

5. Datronics, Inc. ("Datronics"), owns one hundred percent of Rondat's voting common stock, consisting of 200 shares of such stock purchased for \$2,200,000.00. These shares carry a stated value of \$225.00 per share (totalling \$45,000.00) with the balance paid by Datronics (\$2,155,000.00) shown by Rondat as paid-in capital.

6. Rondat's issued and outstanding stock consists solely of the aforementioned preferred stock owned by Bankers and common stock owned by Datronics.

7. Schedule L (Balance Sheets) filed with Rondat's 1979 U.S. Corporation Income tax Return (Form IT-1120) reflects, at line 21, the following:

"Capital Stock: (a)	Preferred stock	\$13,300,000.00
(b)	Common Stock	\$ 45,000.00"

8. It is Rondat's position that the term "capital stock" should be read to mean only "voting stock", and thus since Bankers owns no voting stock in Rondat it does not meet the five percent capital stock ownership test [Tax Law §208.9(b)(5)] and the ninety percent interest add back to entire net income is not required.

CONCLUSIONS OF LAW

A. That Tax Law section 208, subdivision 9, paragraph (b), subparagraph (5) states, in pertinent part:

"(b) Entire net income shall be determined without the exclusion, deduction or credit of:

* * *

(5) ninety per centum of interest on indebtedness directly or indirectly owed to any stockholder or shareholder (including subsidiaries of a corporate stockholder or shareholder), or members of the immediate family of an individual stockholder or shareholder, owning in the aggregate in excess of five per centum of the issued capital stock of the taxpayer, except that such interest may, in any event, be deducted

(i) up to an amount not exceeding one thousand dollars,...".

B. That 20 NYCRR 3-2.3(a) provides, in relevant part, as follows:

"[i]n computing entire net income, Federal taxable income must be adjusted by adding to it:

* * *

(6) the amount deducted in computing Federal taxable income for interest on indebtedness...directly or indirectly owed...to a corporate stockholder including its subsidiaries which own beneficially more than five percent of the total number of shares of the taxpayer's issued capital stock..." (emphasis added).

C. That both preferred stock and common stock constitute capital stock. The terms "preferred" and "common" serve merely to distinguish two of the

various classes of such capital stock, according to the rights or privileges (e.g. voting rights, dividend priority, etc.) attached to each share of stock.

D. That petitioner's reliance on provisions relating to combined reporting (see e.g. 20 NYCRR 6-2.2) is misplaced. When combined reports are at issue the question of control over a corporation arises and, consequently, consideration of voting rights attached to capital stock is of significance. Here, however, combined reporting is not at issue and consideration of voting rights does not apply.


E. That since Bankers was the owner of more than five percent of the total number of shares of petitioner's issued capital stock, petitioner was properly required to add back to entire net income ninety percent of the interest it paid to Bankers (see Matter of Norcliff Thayer, Inc. v. Chu, et. al., 123 Misc. 2d 16).

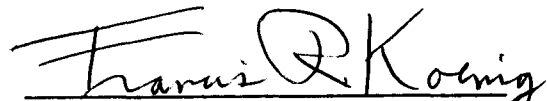
F. That the petition of Rondat, Inc. is hereby denied and the notices of deficiency dated September 15, 1982 are sustained.


DATED: Albany, New York

AUG 21 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER